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No. 07-466

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

ALICIA REEVES and ASHLEE REEVES,

Petitioners,

vs.

ALEX CHURCHICH, KEVIN JONES, DAVID WIERMAN, C. HOUSLEY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. To conform to the record and the relevant facts, the question presented should be restated as follows: Under the Fourth Amendment, is a 14-year-old girl unreasonably seized in circumstances where she sees a police officer point a firearm at her through her open bedroom window, and hears a voice telling her to get on the ground, and instead of complying, she runs from the room?

2. Does insertion of a rifle into a private home by a police officer, acting without a warrant or exigent circumstances, constitute an unlawful entry (a.k.a. an unreasonable search) in violation of the Fourth Amendment?

3. Do officers seize non-suspects within the meaning of the Fourth Amendment when they threaten them with loaded firearms?

4. Can police officers' actions be considered objectively reasonable when, acting without warrant or exigent circumstances, they threaten individuals they know are non-suspects in and about their home with loaded firearms?

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OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Tenth Circuit is reported at 484 F.3d 1244 (10th Cir.2007). The published opinion of the United States District Court for the District of Utah is reported at 331 F.Supp.2d 1347 (D.Utah 2004).

BASIS FOR JURISDICTION

A unanimous decision affirming the district court judgment was entered by the Tenth Circuit on April 24, 2007. No petition for rehearing or for a rehearing *en banc* was filed. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Introduction

Petitioners, mother Alicia and daughter Ashlee, complain that they suffered emotional injury because law enforcement officers looking for a potentially armed and violent assault suspect, came to their duplex, momentarily pointed guns at them, and repeatedly ordered the mother back into her apartment. They also allege that during this encounter a sheriff's detective briefly inserted the muzzle of his rifle into an open, burglar-barred window of their apartment.

Summary of the Facts

The officers' encounter with Petitioners occurred after Respondent Churchich, a Salt Lake County sheriff's detective, developed probable cause to arrest a suspect on suspicion of assaulting his estranged wife and violating a protective order. *Appx. 258-59, as corrected, Supp. Appx. 005.*[1] The suspect's son informed Churchich that the suspect might be leaving town, had access to firearms, and could be armed. *Appx. 249, 258.* The son also told Churchich that the suspect might be staying with relatives in the upstairs half of a duplex in Salt Lake City. *Appx. 248, 251.*

On the afternoon of June 21, 2000, Churchich went to the duplex, without a warrant, hoping to apprehend the suspect by obtaining the relatives' permission to search their apartment. *Appx. 248-49, 278.* Churchich asked for assistance from the Salt Lake City Police Department. *Appx. 248.* Respondent officers Jones, Wierman, and Housley were among the city officers who responded. *Appx. 284, 323, 387.*

Respondents, other officers, and the suspect's son met at a rally point near the duplex. *Appx. 249, 309.* Churchich told the officers at the rally point that he had probable cause to make an arrest without a warrant and that the suspect had access to firearms

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[1] References are to the Appendix or Supplemental Appendix for the briefs in the Tenth Circuit, hereafter, "Appx." or "Supp. Appx."

and could be armed. *Appx. 259, 279.* Churchich subsequently confirmed that the suspect's vehicle was parked in the driveway of the duplex. *Appx. 250.*

Jones told the other officers at the rally point that the target residence was in the upstairs portion of the duplex. *Appx. 278.* It was decided that Jones, Housley, and another city officer would go up to the door of the upstairs apartment since they were in uniform.[2] *Appx. 250, 279.* Wierman, other city officers, and Churchich would cover the outside of the building. *Appx. 251, 318-19.* All the officers had sidearms and Churchich and Wierman were also armed with rifles. *Appx. 323-25.* The officers approached the building with their handguns or rifles at their sides or at a "low ready" position. *Appx. 253, 287, 388.*

The downstairs half of the duplex was occupied by Alicia Reeves and her then 14-year-old daughter, Ashlee. *Appx. 201, 423, 536.* The downstairs apartment is partially below ground level. *Appx. 222.* There are burglar bars on every window, but no screens. *Appx. 221-22, 470.* The main entry door of the duplex is located in the front of the building. *Appx. 204.* Behind the unlocked entry door there is a flat landing with stairs to the left leading down to the front door of the downstairs apartment, and

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[2] Churchich was the only officer in civilian attire. *Appx. 209, 251.*

stairs to the right leading up to the upstairs apartment. *Appx. 205-06, 390.*

Alicia and Ashlee arrived home at about 3:30 p.m. *Appx. 204.* Ashlee went in to take a shower while her mother napped on the living room couch. *Appx. 204, 469.* Ten or fifteen minutes later, Ashlee walked naked into her bedroom. *Appx. 469, 537.* She heard footsteps outside her bedroom window and someone say "hold it" or "hold it right there." *Appx. 469-70.* She believed the people outside her window were police officers but was not sure. *Appx. 469.* Although Wierman testified that he pointed his rifle at movement in the window he regarded as a possible threat, Ashlee did not see any guns pointing at her while she was in her bedroom. *Appx. 338, 470.* Ashlee ran from the room and woke her mother. *Appx. 206, 469.* Alicia told her to go and get dressed in Alicia's bedroom. *Appx. 206.*

Ashlee went to Alicia's bedroom to get dressed. *Appx. 469.* The blinds in the bedroom window were up, the window was open, but barred, and foliage partially covered the window. *Appx. 469-70, 537.* A neighbor saw an officer, presumably Churchich, stick his rifle into the window of Alicia's bedroom. *Appx. 530.*[3] Ashlee saw a gun barrel pointing down through the window, even with, or just past, the

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[3] Churchich denied pointing a gun at, or through, any windows of the duplex but accepted this allegation as true for purposes of summary judgment. *Appx. 252.*

inside window ledge. *Appx. 469-71.* The barrel was moving around, and at some point, it was pointed at her.[4] *Appx. 448, 470.* Ashlee heard a male voice say, "Get down on the ground."[5] *Appx. 469-70.* Ashlee said nothing, reached up, shut the blinds, ran from her mother's bedroom, and tried again to rouse her mother. *Appx. 469.*

Ashlee, after running from her mother's bedroom, did not return to either bedroom, but stayed on the couch at her mother's instruction. *Appx. 471.* At one point, Ashlee went to the front door of her apartment and heard a female voice tell her mother to get back in her house and her mother refuse to do so. *Appx. 472.* Ashlee remained inside her apartment throughout the incident as instructed by her mother, and never spoke with any of the officers that day. *Appx. 471, 477.*

Meanwhile, because she heard her daughter yelling and her dog barking, Alicia got up from the couch and went out her apartment door. *Appx. 206-07.* She went up the stairs to the landing to let the

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[4] In a deposition, Ashlee referred to the rifle as "following" her, but in a subsequent affidavit, Ashlee merely stated that the rifle pointed at her. There is no evidence that Churchich "aimed" the rifle at Ashlee.

[5] Although Petitioners still refer to this conduct as an "assault," they did not appeal the dismissal of their state law claims, including assault.

dog outside.[6] *Appx. 207.* Alicia picked up her dog and opened the main door. *Appx. 207.* When Alicia began to push open the screen door to go outside, an officer, presumably Jones, turned around and pointed a pistol at her face. *Appx. 207-08, 279.* Alicia pushed the gun away, told the officer not to point the gun at her, and asked what was going on. *Appx. 207, 211.* Alicia then heard her daughter scream from downstairs and returned to her apartment. *Appx. 211.* Through her windows, Alicia saw officers in uniform outside her apartment, some looking in the windows. *Appx. 207, 209, 222.*

Alicia then went back outside, saw Jones again, and again asked what was happening. *Appx. 207.* Jones still did not answer her. *Appx. 207.* Jones asked where she lived and she told him, "I live downstairs." *Appx. 207.*

Alicia returned to her apartment for the second time, but soon heard a commotion outside. *Appx. 207.* Alicia went out and saw officers pulling the female resident of the upstairs apartment out of the apartment. *Appx. 207, 210.* Alicia saw an officer in plainclothes, presumably Churchich, standing on the

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[6] Contrary to statements made in their Petition, p.4-5, Alicia testified that she was concerned about her dog's barking, not about "who was molesting her daughter and to put a stop to it." *Appx. 207.* Alicia wanted the officers to stop because she did not understand what they were doing and they were scaring her daughter, not that they had the "wrong home" or were "assaulting and menacing her daughter." *Appx. 211.*

landing inside the main door of the duplex. *Appx. 210.* Churchich was carrying a rifle pointed straight down at his side. *Appx. 210.* Alicia was below him on the stairs. *Appx. 212.* Churchich lifted his rifle up about three feet, pointed it in Alicia's direction and told her to go back inside her apartment.[7] *Appx. 210, 212.* Alicia told Churchich that she was not going back into her apartment. *Appx. 207.* She said she was afraid and wanted to know what was happening. *Appx. 207.*

Housley heard Alicia "arguing" with the officer on the landing and concluded that Alicia was interfering and had refused to return to her apartment as instructed. *Appx. 394.* Housley told Alicia that it was none of her business and to get back inside her apartment. *Appx. 209.*[8] Alicia refused. *Appx. 209.* Housley then told Alicia "to get back inside your apartment, bitch,"[9] and Alicia responded, "I am not leaving. I want to know what's going on." *Appx. 209.*

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[7] Churchich denied speaking to, or even seeing, Alicia at the duplex that day, but accepted this allegation as true for purposes of summary judgment. *Appx. 254.*

[8] Bystanders were to be kept out of the hallway based on information that the suspect could be armed. *Appx. 289.* Despite Petitioners' assertion, p.3, that the officers "did nothing to notify, warn, or otherwise protect" them, Alicia ignored repeated instructions to return to her apartment for her own safety. *Appx. 207-12.*

[9] Housley denied using the expletive. *Appx. 391.*

Alicia did not go back inside her apartment immediately, but remained there for a few minutes. *Appx. 212.* Churchich remained on the landing for only a few seconds before going upstairs. *Appx. 253.*

Churchich did not locate the suspect on the premises that day.[10] *Appx. 257.* During the 30-45 minute duration of the incident, Alicia went in and out of her apartment, at will, at least four times. *Appx. 213.* None of the officers ever touched Alicia, nor did they ever set foot into the downstairs apartment. *Appx. 208, 477.* Alicia refused to return to her apartment despite the officers' instructions and repeatedly told the officers that she was not leaving. *Appx. 207, 209-10.* Alicia testified that the officers would not answer her questions, but just told her "to get back in my house and mind my own business." *Appx. 208.*

Petitioners claim to have suffered emotional injury from the encounter but no physical injury. *Supp. Appx. 233.*

Summary of the Proceedings

Of the original defendants, two of the three county officers and four of the seven city officers were dismissed from the suit by stipulation. The remaining defendants moved for summary judgment on the

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[10] The suspect was later apprehended by a SWAT team in Las Vegas, Nevada. *Appx. 258.*

basis of qualified immunity, which the district court granted. Plaintiffs appealed to the Tenth Circuit, which affirmed the judgment of the district court.

The Tenth Circuit held that the momentary pointing of firearms at Petitioners did not constitute a seizure because neither Petitioner submitted to the officers' show of authority. The circuit court also held that the intrusion of the rifle muzzle into the window did not constitute a search because no private information was conveyed by the act. Even if a seizure occurred, it further held, the seizure was objectively reasonable in the totality of circumstances.

REASONS TO DENY THE WRIT

Introduction

The decision of the Tenth Circuit is correct, does not conflict with any decision of this Court, and does not demonstrate any conflict among the federal circuit courts, state courts of last resort, or between the federal and state courts. Review of the decision is unwarranted because the constitutional analysis established by prior decisions of this Court was properly applied and any "new analytical framework" suggested by Petitioners would be more confusing than helpful. The questions presented are further diminished by the somewhat unusual factual circumstances underlying them, which are not likely to recur with any regularity.

I. Petitioners' Encounter with Respondent Officers Does Not Require Construction of a New Fourth Amendment Framework Regarding *Seizures* Because Supreme Court Precedent Was Properly Applied.

Although proper application of this Court's precedent leads to the conclusion that Petitioners did not suffer an unreasonable seizure, Petitioners argue that common sense dictates that their Fourth Amendment rights were violated.

In arriving at this conclusion, Petitioners dispute the Tenth Circuit's application of *California v. Hodari D.*, 499 U.S. 621 (1991), in determining when a seizure occurs. Petitioners argue that the analysis of *Hodari D.* cannot be applied in their case because they were not "fleeing suspects." Rather, they urge the Court to construct a new analytical framework that would, in essence, distinguish between the seizures of "suspects" and "non-suspects" and expand Fourth Amendment violations to include attempted seizures by police.

This Court clearly held in *Hodari D.* that the Fourth Amendment proscribes unreasonable seizures, not unreasonable attempted seizures. *Id.* at 1550 n.2. A seizure occurs by either physical force or by submission to a show of authority. *Hodari D.*, 499 U.S. at 626-27. Petitioners, who were never physically touched by the officers, and who never submitted to the officers' show of authority, seek to exclude themselves from the law of *Hodari D.* by assuming that

the Respondents "knew" they were not suspects and therefore, should never have pointed weapons at them.[11]

Such an argument rejects the "narrow view" of "seizure" that this Court took in *Hodari D.* and favors return to "the broader view adopted by this Court almost 25 years ago." *Id.* at 632.

As the Tenth Circuit correctly noted, until an individual's relationship to a suspect can be ascertained, police officers may reasonably defer making assumptions about the status of an individual. However, even assuming that such distinctions can be readily made when police are attempting to apprehend a potentially armed and violent suspect, *Hodari D.* already provides clear guidance when a seizure has or has not occurred.

This Court has denied certiorari in other Tenth Circuit cases where *Hodari D.* has been applied to resolve seizure issues involving individuals who have failed to submit to a show of authority by police. *See, e.g., Bella v. Chamberlain*, 24 F.3d 1251 (10th Cir.1994), *cert. denied*, 513 U.S. 1109 (1995) (helicopter pilot who was shot at by police while being forced

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[11] Petitioners argue in contradictory fashion that despite the fact that they were minding their own business in their home, Alicia went out to put a stop to what was going on. Petitioners do not dispute that they failed to submit to the officers' show of authority. The Tenth Circuit opined that their subjective motivations are irrelevant under Fourth Amendment analysis, citing *Brigham City v. Stuart*, ___ U.S. ___, 126 S.Ct. 1943, 1948 (2006).

at gunpoint to facilitate a prison escape was not seized); *United States v. Harris*, 313 F.3d 1228 (10th Cir.2002), *cert. denied*, 537 U.S. 1244 (2003) (pedestrian who was asked for identification and ordered to remove his hands from his pockets was not seized until officer physically removed pedestrian's hands from pockets).

A new Fourth Amendment framework dependent on an arbitrary classification of the persons affected would result in a complex and unworkable rule that would more likely confuse, and not guide, police officers in their conduct. Officers would first have to decide in which category to place an individual before exercising the "unquestioned command of the situation" necessary in order to minimize the risk of harm to themselves and others. *See Michigan v. Summers*, 452 U.S. 692, 702-03 (1981).

Furthermore, the question presented is undercut by the fact that the factual circumstances of which Petitioners complain are unlikely to occur with any regularity. In most cases, officers who point firearms at individuals with the intention of seizing them would take additional measures to effect the seizure if the individuals did not submit to that show of authority. Not only did the Respondents take no additional steps to bring about Petitioners' submission, their orders to Alicia to return to her apartment demonstrate their lack of intent to seize her.

II. Petitioners' Encounter with Respondent Officers Does Not Require Construction of a New Fourth Amendment Framework Regarding *Searches* Because Supreme Court Precedent Was Properly Applied.

Petitioners claim that the Tenth Circuit ignored the plain purpose and meaning of the Fourth Amendment in holding that Respondents never subjected Petitioners to a search. Petitioners seek review in order to expand the breadth of the term "search" to include common law trespass violations by police officers, based on an unusual circumstance in which an officer is alleged to have briefly inserted a rifle muzzle into the burglar-barred, open window of a home.

While the circumstances of the "search" are somewhat novel, Supreme Court precedent was properly applied by the Tenth Circuit in resolving the issue. As the Tenth Circuit noted (and Petitioners do not dispute), the officers were lawfully present in the yard of the apartment building. Neither Churchich nor any part of his body entered the home. Although the window was barred, it was open and unscreened and the blinds were up. The rifle was not a surveillance device nor was such a device attached to it. The insertion of the rifle muzzle simply did not permit the officer to ascertain any information which he did not already know. And despite the intrusion of the object through the threshold of the window, there was no "unlawful entry" into the home (which the burglar bars would have thwarted) because no information

was obtained and there was no attempt to gather any. The core of Fourth Amendment protection is privacy. *See Payton v. New York*, 445 U.S. 573, 590 (1980). While the insertion of an object that neither is designed to convey information nor is used in such a manner as to obtain information may constitute a trespass, it is not a privacy violation. This Court has already "decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property." *Kyllo v. United States*, 533 U.S. 27, 32 (2001).

The Tenth Circuit, having determined initially that the intrusion of the rifle muzzle did not constitute a seizure, correctly determined that it also did not constitute a search. In applying *Silverman v. United States*, 365 U.S. 505 (1961), *United States v. Knotts*, 460 U.S. 276 (1983), *United States v. Karo*, 468 U.S. 705 (1984), *Brigham City v. Stuart*, ___ U.S. ___, 126 S.Ct. 1943 (2006), and other cases, the circuit court correctly held that an act not conveying any private information about the home, its contents, or its occupants could not be interpreted as a "search."

Moreover, the circumstances of the alleged "search" are unlikely to be repeated with any regularity. As the Tenth Circuit noted, the use of weapons is typically associated with seizures, not searches, and firearms are not information gathering devices.

Since no new analytical framework is necessary and similar incidents are unlikely to occur with any regularity, further review of the question presented is unwarranted.

III. Petitioners' Claim that the Lower Courts Erred in Granting Qualified Immunity Is Premised on Constitutional Violations that Did Not Occur.

Petitioners claim error in the decision to grant Respondents qualified immunity. That claim is only viable, however, if Petitioners were subjected to an unconstitutional search or seizure. Since the Tenth Circuit determined that Petitioners were subjected to neither a search nor an unreasonable seizure, and those determinations properly applied Supreme Court precedent, there was no underlying constitutional violation.

IV. The Lower Courts Correctly Determined that the Respondent Officers' Actions Were Objectively Reasonable.

Even if a seizure occurred, there is no error for this Court to correct. The actions of the officers were objectively reasonable in the totality of circumstances.

Given the potential for gunplay, it was reasonable for the officers to have their firearms ready for immediate use and to order Alicia to return to her apartment for her own safety. The focus of the investigation was a potentially armed and violent assault suspect, not the Petitioners. Nonetheless, the officers were not familiar with the Petitioners and had no knowledge of their relationship to the suspect, if any. Any pointing of firearms at the Petitioners was brief

and ended when any perceived threat was resolved. While it was unfortunate that an officer's frustration at Alicia's noncompliance may have caused the officer to utter an expletive, that conduct would not in itself render unreasonable the otherwise reasonable actions of the officers.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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